In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,
Petitioner,

v.

JOHN DODGE,
Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN R. BROOKE
1505 Standard Plaza
Portland, Oregon 97204
Counsel for Petitioner

WOOD, WOOD, TATUM,
MOSSER & BROOKE
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 1-76

TABLE OF CONTENTS

Page

PETITION

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 3

Reasons for Granting the Writ 6

Conclusion 15

APPENDIX

Opinion of the Court of Appeals A1

Findings, Conclusions and Judgment of District Court A14

Chart Analyzing Meaning of 33 U.S.C. § 905(b) A18

INDEX OF AUTHORITIES

Page

Cases cited

Atlantic Cleaners & Dyers, Inc. v. *United States*, 286 U.S. 427 (1932) 10

Dawson v. *Contractors Transport Corp.*, 467 F.2d 727 (1972) 14

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952) 12

Italia Societa v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964) 9

Murray v. *United States*, 405 F.2d 1361 (1968) 13

Reed v. *Steamship Yaka*, 373 U.S. 410 (1963) .. 9

United States v. *Reliable Transfer Co., Inc.*, — U.S. —, 44 L. Ed. 2d 251 (1975) 12

Statutes and Other Authorities Cited

28 U.S.C. § 1254(1) 2, 5

28 U.S.C. § 1291 5

28 U.S.C. § 1332 5

28 U.S.C. § 2101(c) 2

33 U.S.C. § 901 *et seq* 2, 6

33 U.S.C. § 905(b) 3, 9, 10, 11

33 U.S.C. § 941 8

Senate Report 92-1125, 92nd Cong., 2nd Sess. 6, 8, 11

House of Representatives Report 92-1141, 92nd Cong., 2nd Sess. 7, 8, 11

Safety and Health Regulations for Longshoring 1972 (29 C.F.R. Part 1918)

§ 1918.2(a) 8

§ 1918.91(c) 9

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Petitioner Mitsui Shintaku Ginko K.K., Tokyo, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 21, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported. The

full text of the opinion appears in the Appendix (A1).

The opinion of the United States District Court for the District of Oregon is not reported. The full text of the opinion appears in the Appendix (A14).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 21, 1975. This Petition for Writ of Certiorari is filed within 90 days of that date. Petitioner believes 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c) confers jurisdiction upon this Court to review that judgment .

QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that Congress intended, in amending the Longshoremen's and Harbor Workers' Compensation Act (The Act) 33 U.S.C. 901 et seq in 1972, that a partially negligent shipowner should bear the ful. responsibility for a longshoreman employee's injury while the concurrently negligent stevedore employer recoups compensation benefits it provided the injured longshoreman?

2. Should this Court, in the absence of Congressional action, fashion a fair remedy for a longshoreman injury caused by joint shipowner/stevedore negligence?

STATUTES INVOLVED

33 U.S.C. § 905(b):

"In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act."

STATEMENT OF THE CASE

A. Statement of facts.

Respondent John Dodge (hereafter referred to as "Dodge") brought a negligence action for personal in-

juries against Petitioner Mitsui Shintaku Ginko K.K. (hereafter referred to as 'Shipowner"). The action was for injuries Dodge claimed to have suffered aboard the M.S. KANEYOSHI MARU while employed as a longshoreman by the Respondent Brady-Hamilton Stevedore Company (hereafter referred to as "Stevedore"). The alleged accident occurred on December 7, 1972, at Portland, Oregon.

Shipowner contended that Dodge's injuries were contributed to by Stevedore's negligence and breach of warranty. Shipowner contended that because of Stevedore's negligence, any judgment that Dodge received should be reduced and Stevedore should be denied recoupment of all compensation and medical benefits paid to Dodge pursuant to the Act. Stevedore intervened to defend against these Shipowner contentions, denied any concurring negligence or breach of warranty, and asserted a lien for all compensation and medical benefits paid to Dodge.

Dodge's lawsuit, which was tried to the court without a jury, resulted in the court finding that Dodge, who slipped on ice and snow on the vessel's deck, was injured as a result of the equal concurring negligence of Shipowner and Stevedore, and that Dodge's damages were $9,000.00 The court further ruled that Shipowner was not entitled to have Dodge's $9,000.00 damage award reduced to any extent because of the concurring negligence of Stevedore, and further, that Stevedore was entitled to a "lien" against Dodge's judgment for the $1,454.92 of compensation and medical benefits it had provided Dodge pursuant to The Act.

Shipowner appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. The Court of Appeals held that a longshoreman who has been injured by the equal concurring negligence of his employer stevedore and the vessel owner can recover the total of his damages from the vessel owner and the stevedore-employer, though concurrently negligent, is entitled to a "lien" for recoupment of its expenditures made under The Act.

This is a companion case to *Shellman* v. *United States Lines, Inc.*, No. 75-3058, decided by Ninth Circuit at the same time and in which a Petition for a Writ of Certiorari will be filed soon. The petitions in *Shellman* and in *Dodge* raise questions similar to those raised in *A/S ARCADIA* v. *Gulf Insurance Company* in which a Petition for a Writ of Certiorari was filed on October 31, 1975 (No. 75-646).

B. Basis for federal jurisdiction.

The District Court's jurisdiction was founded upon 28 U.S.C. § 1332. The Court of Appeals for the Ninth Circuit had jurisdiction for the appeal pursuant to 28 U.S.C. § 1291. Jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

I

The questions presented for review by this case are of great importance and concern to the shipping industry. After years of case law development, Congress undertook a thorough review of the longshoremen compensation legislation, existing court interpretations of that legislation and third-party litigation involving longshoremen, owners of vessels and stevedore employers. The outcome of that review was The Act amendments of 1972. 33 U.S.C. § 901 *et seq.*

Congress, in the amendments, took away the injured employee's remedy for unseaworthiness of a vessel, eliminating his right to recover from a vesselowner on a basis of near strict liability; the injured employee was given a right to sue a vesselowner for that owner's negligence; the injured employee was given the right to increased compensation benefits to provide more adequate income replacement, and to insure that stevedore employers bear the cost of unsafe conditions. The purpose of requiring stevedore employers to bear the cost of unsafe conditions was to strengthen their incentives to provide on-the-job safety. Senate Report 92-1125, 92nd Cong. 2nd Sess. Longshoremen throughout the United States are vitally interested in a definitive judicial interpretation of these substantive changes in their rights of compensation and recovery against third parties.

In exchange for its increased compensation obligations and retained insulation from suit by employees, the amendments relieved stevedore employers from liability to vesselowners for indemnity. The stated goal was to eliminate any requirement for payment by a stevedore employer to a vesselowner of any damages which the vesselowner was required to pay a longshoreman employee in a third-party lawsuit. House Report No. 92-1141, 92nd Cong. 2nd Sess. Stevedore employers throughout the United States are vitally interested in a definitive judicial interpretation of these substantial changes in their compensation obligations and their liability exposure.

As the third part of this legislative revision, the amendments eliminated the shipowner's liability to longshoremen for injuries caused by unseaworthiness of the vessel and shipowners are no longer liable for the negligence of a longshoreman's fellow employee or the negligence of the stevedore company. The shipowner's liability to a longshoreman employee is to be based solely on its own negligence. House Report No. 92-1141, 92nd Cong. 2nd Sess. Shipowners are vitally concerned in having a definitive judicial interpretation of the extent of their liability for longshoremen injuries caused in part by their negligence and in part by the stevedores, a situation of common occurrence on the waterfront.

The opinion in this case by the Court of Appeals holds that a longshoreman, injured by the concurring negligence of the stevedore employer and the shipowner, can recover the total of his damages

from the shipowner and the stevedore is entitled to reimbursement out of that recovery for the full amount of compensation benefits paid to the longshoreman. This harsh and incongruous result stems from a misconceived interpretation of the 1972 amendments to The Act.

The Senate and House Committees which promulgated the amendments emphasized the crucial importance of increased safety on the waterfront and noted that the amendments would accomplish this by "assuring that the employer bears the cost of unsafe conditions," and this would "serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety." Senate Report No. 92-1125, 92nd Cong., 2nd Sess.; House of Representatives Report No. 92-1141, 92nd Cong., 2nd Sess.

The Court of Appeals' interpretation of the amendments freeing the stevedore of any responsibility when some shipowner negligence is shown repudiates the basic emphasis of the amendments, as noted in the preceding paragraph, violates the mandate of The Act (33 U.S.C. 941) of placing responsibility on the stevedore employer "to render safe such employment and places of employment and to prevent injury to his employees" and cannot be reconciled with U. S. Dept. of Labor's Safety and Health Regulations for Longshoring, (29 C.F.R. part 1918) promulgated pursuant to The Act, which puts the onus of obeying the regulations on the stevedore:

"Section 1918.2(a). The responsibility for compli-

ance with the regulations of this part is placed upon 'employers' as defined in 1504.3(c)."

The stevedore employer's obligations under the regulations for ice and snow on the deck are clear.

"1918.91(c). Slippery conditions shall be eliminated as they occur."

The Court of Appeals' interpretation runs contrary to the objectives under The Act of protecting longshoremen and of "placing the burden ultimately on the company whose default caused the injury." *Reed* v. *Steamship Yaka*, 373 U.S. 410 (1963); *Italia Societa* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

There is no specific language in the amendments which deals with the result Congress intended when a longshoreman's injury is caused by joint shipowner-stevedore negligence. While the amendments lack any expression of what Congress intended, the strong implication from the language used in Section 905(b) is that Congress intended that shipowners are not to be responsible in full for longshoreman injuries caused in part by the negligence of the stevedore.

That implication is shown by determining what meaning Congress intended should be given the words "caused by the negligence of" found in the first three sentences of that section.

It is a generally accepted rule of statutory construction that when similar words are used in consecutive sentences in a statute, unless otherwise indicated,

it is presumed the legislative body intends the same meaning should be applied throughout. *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427 (1932). The only meaning that can be given to the key words in the first three sentences, "caused by the negligence of," which make sense when consistently applied is "to the extent caused by the negligence of." If a meaning of "in any way caused by" is used, an injured longshoreman is given a remedy upon any showing of negligence by the shipowner in the first sentence, but is denied a remedy in the second sentence if there is a showing of any concurring negligence by a fellow longshoreman, despite substantial shipowner negligence—an obvious absurd result. If a meaning of "solely caused by the negligence of" is used, an injured longshoreman would only have a remedy when the shipowner's negligence is the sole cause of his injuries in the first sentence, but under the second sentence when hired directly by the shipowner, an injured longshoreman would have a remedy against the shipowner unless the negligence of a fellow longshoreman was the sole cause of his injuries. This again produces an absurd result.

A workable result is achieved only when a meaning of "to the extent caused by the negligence of" is applied to each of the first three sentences of § 905 (b). Under that meaning, a shipowner is liable only to the extent the shipowner's negligence has caused the longshoreman's injury. See Appendix (A18) for a chart showing this analysis of the legal interpretations that can be given to the key words "caused by

the negligence of" found in the first three sentences of § 905(b).

The Court of Appeals' interpretation of the amendments cannot be square with the meaning of the words "caused by the negligence of" suggested by the foregoing analysis. The suggested meaning "to the extent caused by the negligence of" would make the shipowner liable only to the extent the shipowner's negligence caused injury to the longshoreman which, by necessary corollary, would require a retention of some stevedore liability, be it compensation or some other form of responsibility.

The Committee Reports provide no discussion of what the Committees intended should be the result in the case of joint shipowner-stevedore caused longshoreman injuries, although the Reports do indicate what the Committees intended in a number of areas. The Reports reflect that the Committees intended that the courts should give uniform application to the negligence remedy throughout the United States; that legal questions that arise concerning the longshoremen's negligence remedy should be decided by the courts as a matter of Federal law; that the admiralty concept of comparative negligence and not common law contributory negligence should be applied; and that the concept of assumption of the risk was not applicable as a defense to the longshoremen's negligence action. Senate Report 92-1125, 92nd Cong., 2nd Sess., House Representatives Report No. 92-1141, 92nd Cong., 2nd Sess. The glaring absence of any discussion of what Con-

gress intended in the area of shipowner-stevedore caused injuries should be construed as an invitation to the judiciary to fashion its own rule, considering that 24 years ago, in the *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, case, 342 U.S. 282 (1952) this Court suggested that Congress do so.

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action.

If Congress intended that the law of the *Halcyon* decision should be applied, how simple it would have been for the Committee Reports to say so. It stretches reason to the extreme to conclude that Congress intended for the judiciary to return to *Halcyon* without some token expression of such intention. It seems far more likely that Congress' silence was an intentional recognition of the lead traditionally taken by the judiciary in formulating flexible and fair remedies in the law maritime. See *United States* v. *Reliable Transfer Co., Inc.*, — U.S. —, 44 L. Ed. 2d 251 (1975).

The *Reliable Transfer* case would suggest that a fair remedy in the joint shipowner-stevedore caused injuries would give consideration to the extent to which the fault of each contributed to the longshoreman's injury—something totally lacking in the Court of Appeals' decision. Congressional inaction in this most controversial and ever occurring happenstance of joint shipowner-stevedore caused injuries calls for a fresh evaluation by this Court.

II

The Court of Appeals' decision in *Dodge* conflicts with the rule in the District of Columbia which allows an injured employee to recover only 50% of his damages from a negligent third party when the negligence of his employer was a concurring cause of the employee's injuries. That rule was discussed by the Court of Appeals for the District of Columbia Circuit in *Murray* v. *United States*, 405 F.2d 1361 (1968). In that case, Murray owned a building which he leased to the United States. A government employee, injured when an elevator in the building fell, received compensation benefits from the United States under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq*. The government employee sought a damage recovery from Murray for his negligence. The Court of Appeals affirmed the denial of Murray's claim for indemnity and contribution from the United States and in doing so said:

> "Any inequity residing in the denial of contribution against the employer is mitigated if not eliminated by our rule in *Martello* v. *Hawley*, 112 U.S. App. D.C. 129, 300 F.2d 721 (1962). *Martello* holds that where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, though unable to obtain contribution because the settling tortfeasor had 'bought his peace,' is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement. In our situation if the building owner is held liable the damages payable should be limited to one-half of the amount of

damages sustained by plaintiff, assuming the facts would have entitled the owner to contribution from the employer if the statute had not interposed a bar. A tortfeasor jointly responsible with an employer is not compelled to pay the total common law damages. The common law recovery of the injured employee is thus reduced in consequence of the employee's compensation act, but that act gave him assurance of compensation even in the absence of fault."

In 1972, the rule in the *Murray* case was discussed at some length by the Court of Appeals for the District of Columbia Circuit in *Dawson* v. *Contractors Transport Corp.*, 467 F.2d 727. Dawson was injured while assisting in loading some refrigerators from a truck during the construction of the Watergate Apartments. Dawson recovered compensation benefits from his employer, a plumbing sub-contractor, under the Longshoremen's and Harbor Workers' Compensation Act. Dawson also sued the general contractor and the owner of the truck for negligence. The owner of the truck claimed over against Dawson's employer seeking a credit of 50% against any judgment that might be awarded against him. The actual issue before the court was whether a defendant claiming over was entitled to a jury trial as a matter of right. In the body of the opinion, the court discussed with approval the so-called Murray Credit Rule:

"Since employers covered by workmen's compensation statutes are not liable in tort to their injured employees, other tortfeasors are not entitled to contribution from a negligent employer, and

thus, before *Murray*, bore the entire burden of the tort damages.

"To mitigate the harshness of this result, we held in *Murray* that a person against whom the employee was awarded damages in a tort action could reduce the judgment by 50% if he could show that the employer's negligence contributed to the injury."

The conflict between the rule in the Court of Appeals for the District of Columbia Circuit and the rule in the Ninth Circuit announced in the *Dodge* case needs to be reconciled.

CONCLUSION

For the foregoing reasons, Petitioner submits that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN R. BROOKE
1505 Standard Plaza
Portland, Oregon 97204
Counsel for Petitioner

WOOD, WOOD, TATUM, MOSSER & BROOKE
Of Counsel

Dated: January ....., 1976.

Portland, Oregon

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DODGE, Plaintiff-Appellee,	)	
v.	)	
	)	No. 75-1442
MITSUI SHINTAKU GINKO K.K. TOKYO, Defendant-Appellant,	)	OPINION
and	)	
BRADY-HAMILTON STEVEDORE CO., Intervenor-Appellee.	)	

Appeal from the United States District Court
for the District of Oregon

Before: BARNES and BROWNING, Circuit Judges, and BURKE, District Judge.*

* The Honorable Lloyd H. Burke, District Judge, Northern District of California, sitting by designation.

BARNES, Senior Circuit Judge:

Plaintiff, John Dodge, a longshoreman employed by Brady-Hamilton Stevedore Co., suffered injuries when he slipped in snow and ice while working aboard the vessel of defendant Mitsui Shintaku Ginko K.K. Tokyo (herein Mitsui). Under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901 et seq.), Dodge received compensation and medical benefits from his employer in the total amount of $1,454.92 and brought this third-party action against Mitsui for damages. Brady-Hamilton intervened, seek-

ing reimbursement of its payments under the Act if Dodge were successful in his suit.

The District Judge found both Mitsui and Brady-Hamilton were each fifty percent negligent, that Dodge was not contributory negligent, and (upon stipulation between the parties) that plaintiff had sustained general and special damages amounting to $9,000; and that Brady-Hamilton was entitled to a lien of $1,454.92 against Dodge's recovery, representing compensation it paid to Dodge under the Act.

On appeal, Mitsui, the vessel owner, contends that the equal concurring negligence of Brady-Hamilton should result in a fifty percent reduction of Dodge's judgment against the third party. Secondly, Mitsui argues that this Court should deny Brady-Hamilton a lien upon Dodge's judgment due to the fact that the employer was also negligent.

This case is governed by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* The jurisdiction of this appeal is based upon 28 U.S.C. § 1291.

The facts of this case are similar to *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1951), where the Supreme Court was confronted with the question whether to apply the doctrine of contribution to non-collision cases in third party actions where the employee has recovered damages from his employer under the Longshoremen's and Harbor Workers Compensation Act. In that case, the Court refused to allow contribution against the stevedore

even though the stevedore was more negligent than the vessel in causing the longshoreman's injury. In so holding, the Court stated:

> Halcyon now urges us to extend [the doctrine of contribution] to non-collision cases and to allow a contribution here based upon the relative degree of fault of Halcyon and Haenn as found by the jury. . . . In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. . . . We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. 342 U.S. 284-85.

In *Atlantic Coast Line Railroad Co.* v. *Erie Lackawanna Railroad Co.*, 406 U.S. 340 (1972), the Court reaffirmed its decision in *Halcyon*: "We agree that in this noncollision admiralty case the District Court properly dismissed petitioner's third-party complaint for contribution against respondent Erie on the authority of *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282 (1952)." 406 U.S. at 340.

Defendant Mitsui contends that the 1972 Amendments to the Act alter the above result. In a very recent case, however, the Supreme Court, even after the 1972 Amendments, viewed its decision in *Halcyon* with approval:

> These factors underlying our decision in *Halcyon* still have much force. Indeed, the 1972 amend-

ments to the Harbor Workers' Act re-emphasize Congress' determination that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy. *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 416 U.S. 106, 112-13 (1974).

In a footnote, the Court in *Cooper* inserted the following remarks in regard to the Amendments:

> Under the 1972 amendments . . . where the vessel has been held liable for negligence "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties shall be void." 33 U.S.C. 905 (b) (1970 ed., Supp. II). The intent and effect of this amendment was to overrule this Court's decisions in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), and *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1957), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and *allowing the vessel* to maintain an action for *indemnity* against the employer. 417 U.S. at 113 n. 6 (emphasis added).

Hence, it appears that the effect of the 1972 Amendments was to disallow both contribution and indemnity. The House Committee Report supports this intent:

> [U]nless . . . *indemnity or contribution* agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of Section 5 of the Act by requiring indemnification from

> a covered employer for employee injuries.
>
> Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort. H.R. Rep. No. 92-1441 at 7 (emphasis added).

Recent federal cases also support the view that the third party vessel is not entitled to contribution against the stevedore. A recent district court decision exemplifies this rationale:

> The Act clearly provides for such a suit [against a third party] regardless of the concurrent negligence by the stevedore. . . . [W]e consider it clear that with respect to the stevedore the sole liability was that provided under the Act. Congress sought to eliminate all actions against the stevedore *whether for indemnity or contribution*, whether based on tort or on contract, and whether for fees and expenses. *Lucas* v. *"Brinkness" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974) (emphasis added).
>
> *In accord: Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756 (2d Cir. June 18, 1975); *Hubbard* v. *Great Pacific Shipping Co.*, Civ. No. 74-289 (D. Ore. June 16, 1975); *Santiago* v. *Liberian Distance Transports, Inc.*, Civ. No. 524-7302 (W.D. Wash. June 2, 1975).

In light of the above authority, we hold that the employer-stevedore has no liability to the vessel owner, either directly or indirectly, for personal injury dam-

ages incurred in a compensation-covered accident. *See* Cohen & Dougherty, *The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act: An Opportunity For Equitable Uniformity in Tripartite Industrial Accident Litigation*, 19 N.Y.L.F. 587, 594 (1974).

Secondly, even if the doctrine of contribution does not apply here, defendant Mitsui contends that the equal concurring negligence of the stevedore should result in a fifty percent reduction of plaintiff Dodge's recovery aaginst Mitsui. Defendant derives its authority from *Shellman* v. *United States Lines, Inc.*, Civ. No. 73-1902-R (C.D. Cal. Nov. 25, 1974), where the district judge reduced the plaintiff's recovery by the percentage of his own contributory negligence *plus* the percentage of the stevedore's concurring negligence. *See also Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir. 1968), which held that where plaintiff's injuries were caused by the concurring negligence of the stevedore, he is only entitled to receive one-half of the damages from the negligent shipowner.

We reject both the *Murray Credit* and *Shellman* Doctrines because they are contrary to the greater weight of authority, and also because they impose unjustified burdens upon the injured longshoreman. The Second Circuit very recently considered the adoption of the *Murray Credit* Theory and rejected it, observing: "We cannot agree that some negligence by the employer is enough to cut off the injured longshoreman's protected right to sue the ship for its own neg-

ligence." *Landon* v. *Lief Hoegh and Co., Inc.*, No. 74-2304, 521 F.2d 756, 763 (2nd Cir. June 18, 1975). The *Murray Credit* Doctrine has also been criticized by commentators. *See, e.g., Cohen & Dougherty, supra*, at 605.

The first District Court, after the passage of the 1972 Amendments, to consider the above question was composed of a three-judge panel which held that the recovery of an injured employee against a negligent vessel owner was not to be diminished by the concurring negligence of the employer stevedore. *Lucas* v. *"Brinkness" Schiffahrts Ges.*, 379 F. Supp. 759, 769 (E.D. Pa. 1974). In *Hubbard* v. *Great Pacific Shipping Co.*, Civ. No. 74-289 (D. Ore. June 16, 1975), the court rejected both the *Murray Credit* and *Shellman* Doctrines. In so holding, the District Judge observed:

> The defendant-shipowner's two partial theories [*Murray Credit* and *Shellman*] would have the result of negating Congress's intent of eliminating direct or indirect third-party actions in longshoreman-injury cases as embodied in the 1972 Amendments to the Longshoremen's and Harbor Worker's Compensation Act. This is simply a case of *concurring* negligence of the defendant-shipowner and the stevedore which, under a negligence theory, still entitles the plaintiff to a judgment against the defendant-shipowner in the full amount of his damages (emphasis added).

In another recent case, *Santino* v. *Liberian Distance Transports, Inc.*, No. 524-73C2 (W.D. Wash.

June 2, 1975), the District Judge agreed with the rationale of the *Lucas* court. *See Solsvik* v. *Maremar Compania Naviera, S.A.*, No. C75-186S, 399 F. Supp. 712 (W.D. Wash. August 6, 1975). In holding that an employee injured by the concurring negligence of the employer-stevedore and the vessel owner can recover "the *total* of his damages from th shipowner," the court made the following remarks:

> On its face it seems inequitable for a shipowner to be liable to an injured longshoreman for all of the latter's damages if the negligence of the shipowner was not the sole proximate cause of the injuries but rather concurred with the negligence of the stevedore employer. Particularly would this be true if the fault of the stevedore employer were much greater than that of the shipowner. Nevertheless, since the Longshoremen and Harbor Workers' Act is a creature of Congress, it would in this Court's opinion be better for Congress to effect the elimination of any inequity than to have the various District Courts seek to remove that inequity by means which would unavoidably vary from district to district.
>
> Permitting a shipowner to plead the negligence of the stevedore as an affirmative defense would not eliminate inequity. *It would simply shift the inequity from shipowner to injured longshoreman. He would be restricted in his recovery as against the shipowner without acquiring any offsetting rights under the Act as against his stevedore employer.* (emphasis added)

We agree with this rationale. To reduce plaintiff Dodge's recovery here because of the concurring negligence of his employer-stevedore, would simply shift the inequity from defendant Mitsui to Dodge. Furthermore, the Supreme Court clearly emphasized in *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 286 (1952), that it is for the Congress and not for the courts to create a solution to this problem. We therefore hold that a longshoreman who has received injuries caused by the concurring negligence of his stevedore employer and the shipowner can recover the full amount of his damages from the shipowner.

Lastly, defendant Mitusi contends that this Court should deny the stevedore employer a lien upon plaintiff's judgment due to the fact that the stevedore was concurrently negligent. This contention is based on the premise that the employer's right of reimbursement is an equitable one. Being an equitable right, "[t]here is no equity in the principle that a stevedore should be allowed to enforce an unmitigated lien on a personal injury judgment which has been reduced because of the stevedore's concurrent negligence." *Croshaw* v. *Koninklijke Nedlloyd, B.V. Rijswijk*, Civ. No. 74-250, 398 F. Supp. 1224, 1234 (D. Ore. July 31, 1975).

The problem with the above approach is: call the lien what you may, equitable or legal, the reduction of the stevedore's recovery would be another form of contribution, which the Act seeks to prohibit. The Supreme Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406 (1953), held that even though the stevedore was concurrently negligent, it could still recover its compensation lien in full:

> § 33 of the [Longshoremen's and Harbor Workers' Compensation] Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries [The shipowner's] contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of [the shipowner's] liability at the expense of [the stevedore employer] would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case. 346 U.S. at 412.

In a recent case, the Second Circuit held that the rule stated in *Pope & Talbott* is still good law. *Landon* v. *Lief Hoegh and Co.*, No. 74-2304, 521 F.2d at 760 (2d Cir. June 18, 1975).[1]

It is clear that, by its terms, § 33(b) of the Act operates to give the employer an assignment of the rights of the injured longshoreman against any third-party tortfeasor *unless* the employee shall have commenced an action against such third party tortfeasor within six months after an award in a compensation order has been made and filed by the Deputy Commissioner or the Board. It is, however, equally clear that the employer's remedy under § 33 of the Act is not his exclusive remedy. In *Federal Marine Terminals, Inc.* v. *Burnside Shipping Co.*, 394 U.S. 404 (1969), the Supreme Court noted:

> When Congress imposed on the employer absolute liability for compensation, it explicitly made that liability exclusive. Yet in the same Act it attached no such exclusivity to the employer's action against third persons as subrogee to the rights of the employee or his representative. . . . [W]e can perceive no reason why Congress would have intended so to curtail the stevedoring contractor's rights against the shipowner. . . . [T]his Court [never] . . . has held that statutory subrogation is the employer's exclusive remedy against third party wrongdoers, and we decline to so hold today. 394 U.S. at 412-14.

Because the employer stevedore's remedy under § 33 is not exclusive, this Court will consider the question whether the stevedore has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the compensation *without* such an award. In the leading case involving this question, the Third Circuit remarked:

> We find no intent indicated by the Act to take away from the employer who pays compensation without an award, his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized *wholly apart from* and without regard for the assignment provided for in Sec. 33(b) of the Act.

[1] It is indeed questionable whether it is equitable for the stevedore employer to recover the full amount of its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries. The issue before us, however, is not whether *Halcyon* and *Pope & Talbot* were correctly decided. Rather, because these decisions are still good law, our obligation is to apply the principles of those cases to the facts presently before us.

> It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. *His right to reimbursement out of the recovery for the employee's injury remains unaffected. The Etna*, 138 F.2d 37, 41 (3rd Cir. 1943) (emphasis added).

Although decided over thirty years ago, *The Etna* still remains controlling. Earlier this year, the Fifth Circuit, in approving of that decision, held:

> The subrogation right where there is no award is a judicial creature with the statute as a rationale. In cases such as this one, where the employee himself sues the third-party tort-feasor, the courts have long recognized a right of subrogation to the extent of payments made, and have permitted the employer or its insurer to intervene in the employee's suit to protect its right, *even where the compensation has been paid without the entry of a formal compensation award.* (emphasis added) (*Allen* v. *Texaco, Inc.*, 510 F.2d 977, 979-80 (5th Cir. 1975); *in accord*: *Louviere* v. *Shell Oil Company*, 509 F.2d 278, 283-84 (5th Cir. 1975); *Fontana* v. *Pennsylvania R.R.*, 106 F. Supp. 461-462-63 (S.D.N.Y. 1952), *aff'd sub nom., Fontana* v. *Grace Line, Inc.*, 205 F.2d 151 (2d Cir), *cert. denied*, 346 U.S. 886 (1953).

This very issue has been presented before this Court. In *Hugev* v. *Dampskisaktieselskabet International*, 170 F. Supp. 601 (S.D. Cal. 1959), the District Judge held that the stevedore employer, even though negligent, having paid benefits under the act without an award, was entitled to the reimbursement

of its compensation lien out of the employee's recovery against the shipowner. 170 F. Supp at 606-07. On appeal, the District Court's opinion was affirmed in its entirety. *Metropolitan Stevedore Co.* v. *Dampskisaktieselskabet International*, 274 F.2d 875 (9th Cir.), *cert. denied*, 363 U.S. 803 (1960). We believe that this approach is supported by strong authority, and thus hold that the stevedore-employer, even though concurrently negligent, has a right to reimbursement for its expenditures made under the Act regardless of whether it has paid the compensation under an award or has paid the amount without such an award.

In conclusion, in addition to the above ruling, this Court holds that the employer-stevedore has no liability to the shipowner, either directly or indirectly, for personal injury damages incurred in the compensation-covered accident. Secondly, we hold that a longshoreman who has been injured by the concurring negligence of his employer stevedore and the vessel owner can recover the total of his damages from the vessel owner. Applying these principles to the facts of this case, we find that the plaintiff Dodge is to receive $9,000 for his general and special damages from the shipowner, Mitsui. Out of plaintiff's recovery, the employer stevedore, Brady-Hamilton, is entitled to a lien of $1,454.92, representing sums it paid to Dodge under the Act.

Since our holdings agree with that of the District Judge's, the judgment of the District Court is *AFFIRMED.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN DODGE, *Plaintiff,*	)	
v.	)	No. 73-852
MITSUI SHINTAKU GINKO K. K. TOKYO, *Defendant,*	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
v.	)	
BRADY-HAMILTON STEVEDORE CO. *Intervenor.*	)	

The Court makes the following findings of fact and conclusions of law upon the issues presented in the pretrial order:

FINDINGS OF FACT

I.

Plaintiff is a citizen and resident of the State of Oregon. Defendant is a corporation organized and existing under the laws of a foreign nation with no principal place of business in the State of Oregon. Intervenor is a corporation engaged as a master stevedore. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs. This court has no jurisdiction of the parties and the cause on the law side of the court.

II.

Defendant is the owner and operator of the vessel M/S KANEYOSHI MARU. On December 7, 1972, plaintiff was working as a longshoreman on board the vessel while it was berthed on navigable waters of the United States at Portland, Oregon. Intervenor was performing the stevedoring services aboard the vessel M/S KANEYOSHI MARU, pursuant to contract, and was the employer of the plaintiff. On December 7, 1972, the plaintiff slipped on snow aboard the deck of the M/S KANEYOSHI MARU causing him injury.

III.

Plaintiff filed a claim pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 901 et seq., as amended 1972, for Workman's Compensation benefits as a result of his injury. Intervenor paid to plaintiff the sum of $1,213.92 for time loss benefits and $241.00 in medical expense as required by the Longshoremen's and Harbor Workers' Compensation Act.

IV.

At the time and place of plaintiff's injury, the defendant and intervenor and each of them were negligent in failing to remove the ice and snow from the deck area where plaintiff was required to work, and in failing to place suitable materials such as sand, ashes, sawdust or salt on the ice and snow where plaintiff was required to work and the negligence of

each proximately contributed 50% toward plaintiff's accident and injuries.

V.

As a result of the concurring negligence of the defendant and intervenor, plaintiff slipped and fell and suffered injury to his damage in the sum of $9,000.00.

VI.

Plaintiff was not guilty of contributory negligence in any degree.

CONCLUSIONS OF LAW

I.

Defendant is not entitled to have plaintiff's recovery reduced or offset by a credit to the vessel in any amount because of the concurring negligence on the part of the stevedore company.

II.

Plaintiff is entitled to judgment against the defendant in the sum of $9,000.00, together with costs and disbursements.

III.

Intervenor is entitled to a lien in the amount of $1,454.92 against plaintiff's judgment against the defendant.

DATED this 19th day of August, 1974.

Gus J. Solomon
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN DODGE, *Plaintiff,*	)	
v.	)	
MITSUI SHINTAKU GINKO K. K. TOKYO, *Defendant,*	)	Civil No. 73-852
v.	)	JUDGMENT ORDER
BRADY-HAMILTON STEVEDORE CO. *Intervenor.*	)	

Based upon the findings of fact and conclusions of law entered herein, it is hereby

ORDERED that plaintiff, JOHN DODGE, have judgment against defendant MITSUI SHINTAKU GINKO K. K., TOKYO, for the sum of $9,000.00, together with his costs in the sum of $122.10 and intervenor is granted a lien in the amount of $1,454.92 against that judgment.

DATED August 28, 1974.

Gus J. Solomon
U. S. District Court

POSSIBLE INTERPRETATIONS OF THE KEY WORDS "CAUSED BY THE NEGLIGENCE OF" FOUND IN SECTION 905(b) OF THE 1972 AMENDMENTS

1ST SENTENCE OF §905(b)

"In the event of injury to a person covered under this Act *caused by the negligence of a vessel*, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act. . . ."

Does "Caused by the Negligence of a Vessel" in the Above Sentence Mean:

1. "*in any way* caused by the negligence of a vessel"?
2. "*solely* caused by the negligence of a vessel"?
3. "*to the extent* caused by the negligence of a vessel"?

2ND SENTENCE OF §905(b)

"If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was *caused by the negligence of persons* engaged in providing stevedoring services to the vessel."

Does "Caused by the Negligence of Persons" in the Above Sentence Mean:

1. "*in any way* caused by the negligence of persons"?
2. "*solely* caused by the negligence of persons"?
3. "*to the extent* the injury was caused by the negligence of persons"?

3RD SENTENCE OF §905(b)

"If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was *caused by the negligence of persons* engaged in providing ship building or repair services to the vessel."

Does "Caused by the Negligence of Persons" in the Above Sentence Mean:

1. "*in any way* caused by the negligence of persons"?
2. "*solely* caused by the negligence of persons"?
3. "*to the extent* the injury was caused by the negligence of persons"?

In the Supreme Court

of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,
Petitioner,

v.

JOHN DODGE,
Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,
Respondent.

BRIEF OF RESPONDENT BRADY-HAMILTON STEVEDORE CO. IN OPPOSITION TO THE PETITION OF MITSUI SHINTAKU GINKO K.K., TOKYO, FOR A WRIT OF CERTIORARI

FLOYD A. FREDRICKSON
900 S. W. Fifth Avenue
Portland, Oregon 97204
Counsel for Respondent Brady-Hamilton Stevedore Co.

FREDRICKSON, TASSOCK, WEISENSEE, BARTON & COX
Of Counsel

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-76

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinions Below	1
Questions Presented	2
Statement of the Case	2
Argument	2
I. No Conflict Among the Circuits	3
II. No Unsettled Question of Federal Law	7
Conclusion	9

TABLE OF AUTHORITIES

Page

Cases

American Mutual Liability Ins. Co. v. *Matthews*, 182 F.2d 322, 1950 A.M.C. 1272 (2d Cir., 1950) 3

Cooper Stevedoring Co. v. *Fritz Kopke, Inc.*, 417 U.S. 106, 1974 A.M.C. 537 (1974) 7, 8

Dodge v. *Mitsui Shintaku Ginko K.K., Tokyo*, 1975 A.M.C. 1505 (D. Or., 1974) 1

Galimi v. *Jetco, Inc.*, 514 F.2d 949, 1975 A.M.C. 681 (2d Cir., 1975) 6

Griffith v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir., 1975), cert. den. 44 U.S. L.W. 3395, 3398 (Jan. 13, 1976) 6

Halcyon Lines v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 1952 A.M.C. 1 (1952) 3, 4, 6, 7, 8

Landon v. *Lief Hoegh & Co.*, 521 F.2d 756, 1975 A.M.C. 1106 (2d Cir., 1975), cert. den. sub nom. *A/S Arcadia* v. *Gulf Ins. Co.*, 44 U.S. L.W. 3395, 3398 (Jan. 13, 1976) 6

Martello v. *Hawley*, 112 U.S. App. D.C. 129, 300 F.2d 721 (D.C. Cir., 1962) 4

Murray v. *United States*, 405 F.2d 1361 (D.C. Cir., 1968) 3, 4, 5

Pope & Talbot, Inc. v. *Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953) 4, 5, 6, 7, 8

Ryan Stevedoring Co. v. *Pan-Atlantic SS Corp.* 350 U.S. 124, 1956 A.M.C. 9 (1956) 8

White v. *Texas Eastern Transmission Corp.*, 512 F.2d 486 (5th Cir., 1975), cert. den. sub nom. *Bettis Corp.* v. *Charles Wheatley Co.*, 44 U.S.L.W. 3395, 3397 (Jan. 13, 1976) 6

TABLE OF AUTHORITIES (Cont.)

Page

Statutes and Other Authorities

Federal Employees' Compensation Act (F.E.C.A.)

5 U.S.C. § 8101 et seq. 3, 6

5 U.S.C. § 8116 (c) 3

Longshoremen's and Harbor Workers' Compensation Act, as amended

33 U.S.C. § 905 et seq. 2

33 U.S.C. § 905 (a) 3

33 U.S.C. § 905 (b) 6

District of Columbia Compensation Act D.C. Code, § 36-501 et seq. 3

S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972) 9

In the Supreme Court
of the United States

OCTOBER TERM, 1975

MITSUI SHINTAKU GINKO K.K., TOKYO,
Petitioner,

v.

JOHN DODGE,
Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,
Respondent.

BRIEF OF RESPONDENT BRADY-HAMILTON STEVEDORE CO. IN OPPOSITION TO THE PETITION OF MITSUI SHINTAKU GINKO K.K., TOKYO, FOR A WRIT OF CERTIORARI

Respondent Brady-Hamilton Stevedore Co. (Brady-Hamilton) was served with Mitsui's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit on January 21, 1976. Pursuant to Rule 24 of the Court, Brady-Hamilton respectfully submits its brief in opposition to Mitsui's petition.

OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon was reported unofficially at 1975 A.M.C. 1505 (D. Or., 1974).

The opinion of the United States Court of Appeals for the Ninth Circuit has not yet been reported.

QUESTIONS PRESENTED

Brady-Hamilton accepts the statement of the first question presented by Mitsui. However, Brady-Hamilton believes that Mitsui's statement of the second question is misleading and suggests that the following states the issue more accurately:

Do the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., manifest congressional intent to overrule or limit prior decisions of this Court that deny negligent shipowners the right to seek contribution from concurrently negligent stevedore-employers in longshoremen's personal injury suits?

STATEMENT OF THE CASE

Mitsui's statement of the case is acceptable to this respondent.

ARGUMENT

Brady-Hamilton submits that Mitsui's petition should be denied, because the decision below does not conflict with a decision of any other circuit on the same matter and because the only question of federal law presented by Mitsui has been settled by this Court.

I

No Conflict Among the Circuits

Mitsui asserts that the decision below is in conflict with *Murray* v. *United States*, 405 F.2d 1361 (D.C. Cir., 1968). This is not correct. *Murray* involved consideration of the exclusive liability provision of the Federal Employees' Compensation Act (F.E.C.A.), 5 U.S.C. §§ 8101, 8116(c). A government employee was injured when an elevator fell in a building owned by Murray and leased to the United States. The government employee received benefits under F.E.C.A. and commenced a third-party action for negligence against Murray. Murray impleaded the United States, seeking contribution or indemnity. The District Court dismissed both of Murray's claims.

Paradoxically for Mitsui, the decision on which it relies *affirmed* the dismissals. With respect to contribution, the Court of Appeals cited with approval *American Mutual Liability Ins. Co.* v. *Matthews*, 182 F.2d 322, 1950 A.M.C. 1272 (2d Cir., 1950), a decision which held that § 5 (now § 5(a)) of the Longshoremen's Act is a defense by a stevedore-employer against a shipowner's claim for contribution. *Murray* further approved decisions applying *Matthews* both to cases under the District of Columbia Compensation Act (D.C. Code § 36-501 et seq.), which incorporates the Longshoremen's Act, and to cases under F.E.C.A. 405 F.2d, at 1364. The no-contribution rule of *Matthews* was adopted by this Court in *Halcyon Lines* v.

Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282, 1952 A.M.C. 1 (1952).

Mitsui is not concerned with the holdings in *Murray*, and with good reason, but rather with a dictum in that opinion. Having held that F.E.C.A. precluded Murray's action for contribution against the United States, the court said that any inequity residing in the denial of contribution was mitigated if not eliminated by the court's rule in *Martello* v. *Hawley*, 112 U.S. App. D.C. 129, 300 F.2d 721 (D.C. Cir., 1962), an automobile collision case that did not involve workmen's compensation. 405 F.2d, at 1365-66.

The *Murray* court's gratuitous extension of the *Martello* rule to a case involving workmen's compensation is dubious. The court must have reasoned that the United States, which paid its employee compensation pursuant to its absolute liability under F.E.C.A., was in effect a settling tortfeasor that bought its peace with its employee. By further analogy to *Martello*, Murray, the third party, would be entitled to a reduction by one-half of any judgment against him, even if the compensation benefits paid were less than half the amount of his judgment, because otherwise he would be unfairly disadvantaged by a "settlement" to which he was not a party and to which he did not consent. *Martello* v. *Hawley*, *supra*, 300 F.2d, at 724. The *Murray* court was apparently unaware of the decision of this Court in *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 1954 A.M.C. 1 (1953), which held that a shipowner's liability to an injured ship repairman may not be reduced by the amount of compensation payments

made to the injured workman by his employer pursuant to the Longshoremen's Act. The shipowner argued that the plaintiff, Hawn, would have a double recovery if he were allowed to keep his entire judgment, which included sums for lost wages and medical expenses, because the compensation paid by Hawn's employer, Haenn, was on account of lost wages and medical expenses. However, this Court noted that employers are permitted to recoup Longshoremen's Act compensation payments out of third-party recoveries. Acceptance of the shipowner's contention would frustrate one purpose of the Act, which is to protect employers, whom the Act subjects to absolute liability. "Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the *Halcyon* case." 346 U.S., at 412.

Pope & Talbot, Inc. v. *Hawn*, *supra*, makes it clear that there is no conceptual difference between reduction of a third party's liability to the extent of compensation payments made by an employer and reduction of a third party's liability by one-half, on account of compensation payments made by an employer: both credits amount to the same thing — contribution — which is contrary to the policy of the Longshoremen's Act. The decision below correctly recognized and applied the law.

It can hardly be said that *Murray* v. *United States*, *supra*, conflicts with the decision below when the only pertinent holding in *Murray*, on the issue of contribu-

tion, *supports* the decision below. Moreover, even if the precise holding in *Murray* is disregarded, F.E.C.A. exclusive liability cases have little precedential value in cases involving the Longshoremen's Act. See *White* v. *Texas Eastern Transmission Corp.*, 512 F.2d 486, 489-90 (5th Cir., 1975), cert. den. sub nom. *Bettis Corp.* v. *Charles Wheatley Co.*, 44 U.S.L.W. 3395, 3397 (Jan. 13, 1976). *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, and *Pope & Talbot, Inc.* v. *Hawn*, *supra*, are as authoritative on the issues raised by Mitsui as any decisions can be, and their authority obviates any need to look for guidance to the conflicting decisions of lower federal courts in the F.E.C.A. cases.*

A review of the decisions of the Courts of Appeals that have interpreted § 5(b) of the amended Act reveals that there is no conflict among the circuits. The Second and Third Circuits, like the Ninth Circuit, have held that § 5(b) bars actions for contribution against stevedore-employers who have paid benefits pursuant to the Act. See *Landon* v. *Lief Hoegh & Co.*, 521 F.2d 756, 1975 A.M.C. 1106 (2d Cir., 1975), cert. den. sub nom. *A/S Arcadia* v. *Gulf Ins. Co.*, 44 U.S. L.W. 3395, 3398 (Jan. 13, 1976); *Griffith* v. *Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 44 (3d Cir., 1975), cert. den. 44 U.S.L.W. 3395, 3398 (Jan. 13, 1976).

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* The authorities are listed in *Galimi* v. *Jetco, Inc.*, 514 F.2d 949, 953, 1975 A.M.C. 681 (2d Cir., 1975), which holds that FECA bars actions against the United States for contribution or indemnity.

II

No Unsettled Question of Federal Law

Brady-Hamilton has already discussed *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, *supra*, and *Pope & Talbot, Inc.* v. *Hawn*, *supra*. *Halcyon* holds that the Longshoremen's Act does not permit a shipowner to seek contribution from a stevedore-employer who has provided benefits pursuant to the Act and that it is for Congress, not this Court, to create new rules of contribution in the law of maritime personal injuries. *Hawn* holds that a shipowner is not entitled to a credit against his judgment liability in the amount of compensation benefits furnished an injured workman by his employer pursuant to the Act, because such a credit would be the substantial equivalent of contribution. The Ninth Circuit correctly recognized both decisions as controlling on the issues raised by Mitsui.

The opinion of this Court in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 1974 A.M.C. 537 (1974), reaffirms the validity of *Halcyon*. There, the trial court found that Cooper, the loading stevedore in Houston, Texas, was concurrently negligent with the shipowner and that both were liable to Sessions, a longshoreman employee of the discharging stevedore in New Orleans, Louisiana, for injuries caused by their negligent stowage of cargo. Cooper contended that the shipowner's successful action for contribution against it was contrary to the *Halcyon* decision. This Court rejected that contention, holding

that *Halcyon* continues to bar contribution actions against employers who are statutorily immunized from tort liability to their employees by reason of their liability for compensation under the Act. The opinion distinguished *Halcyon* as follows:

> . . . Unlike the injured worker in *Halcyon*, Sessions was not an employee of Cooper and could have proceeded against either the Vessel or Cooper or both of them to recover full damages for his injury. Had Sessions done so, either or both of the defendants could have been held responsible for all or part of the damages. Since Sessions could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right. . . . 47 U.S., at 113.

This Court emphasized that *Halcyon* "was, and still is, good law on its facts." *Id.*, at 115.

The facts of *Halcyon* are also the facts of this case —Brady-Hamilton paid compensation benefits to respondent John Dodge, its employee, and having done so is immunized by statute from any liability to Mitsui.

It would indeed be an irony if the congressional overruling of *Ryan Stevedoring Co.* v. *Pan-Atlantic SS Corp.*, 350 U.S. 124, 1956 A.M.C. 9 (1956), which recognized a right of indemnity against stevedore-employers, should be construed as a restoration *sub silentio* of shipowners' rights to contribution that were denied in *Halcyon* and *Hawn*. In fact, the congressional committees expressed themselves plainly on this subject; the discussion is as follows:

> Under the proposed amendments the vessel may not by contractual agreement *or otherwise* require the employer to indemnify it, in whole *or in part*, for such damages [i.e., third-party liability to harbor workers]. S. Rep. No. 92-1125, 92d Cong., 2d Sess., 10 (1972) (Emphasis added).

The conclusion is compelling that the questions settled long ago by *Halcyon* and *Hawn* have not been reopened by the 1972 amendments to the Longshoremen's Act.

CONCLUSION

For the foregoing reasons, Mitsui's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

FLOYD A. FREDRICKSON
900 S. W. Fifth Avenue
Portland, Oregon 97204
Counsel for Respondent
Brady-Hamilton Stevedore Co.

FREDRICKSON, TASSOCK, WEISENSEE,
BARTON & COX
Of Counsel

February 13, 1976.

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1975

No.75-1058

MITSUI SHINTAKU GINKO K.K., TOYKO,

Petitioner

vs.

JOHN DODGE,

Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,

Respondent

BRIEF OF RESPONDENT JOHN DODGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RAYMOND J. CONBOY
910 Standard Plaza Bldg.
Portland, Oregon 97204
Attorney for Respondent

POZZI, WILSON & ATCHISON, Of Counsel

S U B J E C T I N D E X

	Page
Brief of Respondent John Dodge in Opposition to Petition for Writ of Certiorari ----------	1
Reasons why the Writ should not be Granted ----------	2
Conclusion ----------	16

TABLE OF AUTHORITIES

CASES

	Page
The AETNA, 138 F2d 37 (CA3, 1943) --	4
Allen v. Texaco, Inc., 510 F2d 977 (CA5, 1975) ----------	4
A/S ARCADIA v. Gulf Insurance Co., 44 US Law Week 3398 (No. 75-646)--	2,10, 16
Cooper Stevedoring Co. v. Kopke, 417 US 106 (1974) ----------	6
Dawson v. Contractors Transport Corp., 467 F2d 727 (DC Cir., 1972)	11
Dodge v. Mitsui Shintaku Ginko, ---F2d--- (CA9, November 21, 1975)	11
Griffith v. Wheeling Pittsburg Steel Corp., 521 F2d 37 (CA3, 1975) ----	13,14
Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation, 342 US 282 (1952) ----------	4,5, 6,10
Landon v. Leif Hoegh Co., Inc., 521 F2d 756 (CA2, June 18, 1975) -----	10
Lucas v. "Brinknes" Schiffahrts Ges, 379 F Supp 759 (E.D. Pa., 1974) --	10
Martello v. Hawley, 112 US App DC 129, 300 F2d 721 (1962) ----------	12

TABLE OF AUTHORITIES (Cont.)

CASES

	Page
Murray v. United States, 405 F2d 1361 (DC Cir., 1968) ----------	11,12, 13
Pope & Talbot, Inc. v. Hawn, 346 US 406 (1953) ----------	5,6, 10
Reed v. SS YAKA, 373 US 410 (1963)--	14
Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation, 350 US 124 (1956) ----------	6,7, 10
Shellman v. United States Lines, ---F2d--- (CA9, November 21, 1975), (No. 75-3058) ----------	2,11

STATUTES

5 USC §8131 ----------	11
5 USC §8132 ----------	11,13
33 USC §903 ----------	3
33 USC §905 ----------	3,6, 13,14
33 USC §908 ----------	3

T A B L E O F A U T H O R I T I E S (Cont.)

STATUTES	Page
33 USC §921	3
33 USC §933	4

OTHER AUTHORITIES

United States Senate, 92d Cong., 2d Sess., Report of the Senate Committee on Labor and Public Welfare, No. 92-1125	7,8

I N T H E S U P R E M E C O U R T

OF THE UNITED STATES

OCTOBER TERM, 1975

No.75-1058

MITSUI SHINTAKU GINKO K.K., TOYKO,

Petitioner

vs.

JOHN DODGE,

Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,

Respondent

BRIEF OF RESPONDENT JOHN DODGE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent John Dodge prays that the Petition for Writ of Certiorari be denied.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Petition for Writ of Certiorari brings to this Court no significant, unresolved issue of federal law, nor is there any conflict among the United States Circuit Courts of Appeal. The petitioner states that the "* * * Petitions in Shellman 1/ and in Dodge raise issues similar to those raised in A/S ARCADIA v. Gulf Insurance Company in which a Petition for a Writ of Certiorari was filed on October 31, 1975 (No. 75-646)." (Petition, p. 5). This Court denied certiorari in The ARCADIA on January 12, 1976. 44 US Law Week 3398.

The 1972 Amendments to the Longshoremens' and Harbor Workers' Compensation Act,

1/ Shellman v. United States Lines, No. 75-3058.

Public Law 92-576, 86 Stat 1251, struck a balance between the competing claims of harbor workers, shipowners and master stevedores. The Amendments: (1) increased harbor workers' compensation benefits and extended benefits to certain workmen injured on docks, piers and adjoining areas; (2) eliminated the right of a harbor worker to recover against a vessel owner for unseaworthiness while preserving traditional third party maritime remedies based upon negligence; and (3) barred the vessel owner from obtaining indemnity or contribution from the stevedore for any third party recovery made by the harbor worker against the vessel owner. 33 USC §§903, 905, 908, 921. Congress made no change in the long-standing rule that a harbor worker's employer was entitled to

be reimbursed out of the employee's third party recovery for payments made by the employer under the Longshoremen's and Harbor Workers' Compensation Act, whether or not those payments were made pursuant to the entry of a formal award of compensation. The AETNA, 138 F2d 37 (CA3, 1943); Allen v. Texaco, Inc., 510 F2d 977, 979-80 (CA5, 1975); 33 USC §933.

Moreover, Congress enacted the 1972 Amendments against a backdrop of decisions by this Court holding that the Court would not fashion a common law rule of contribution to permit a vessel owner to recover part of its loss from an injured harbor worker's employer where the negligence of the employer and vessel owner both contributed to the injury. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corporation,

342 US 282 (1952). In Pope & Talbot Inc. v. Hawn, 346 US 406 (1953), the Court rejected the very contention which Petitioner makes here. In Hawn, a vessel owner contended that the judgment against it in favor of an injured harbor worker should be reduced by the sums which the harbor worker's employer had paid under the Harbor Workers' Act, because the employer's negligence contributed to the plaintiff's injuries. The Court rejected the vessel owner's contention, pointing out that the Harbor Workers' Act:

> "* * * has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injury. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subject to absolute liability by the Act. Moreover, reduction of Pope & Talbot's

> liability at the expense of Hawn [the employer] would be the substantial equivalent of contribution which we declined to require in the Halcyon case."

Halcyon has recently been reaffirmed by this Court in Cooper Stevedoring Co. v. Kopke, 417 US 106 (1974).

The 1972 Amendments not only preserve this Court's rulings in Halcyon and Hawn, but legislatively overrule Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corporation, 350 US 124 (1956), which held that vessel owners were entitled to indemnity from master stevedores for third party recoveries obtained by harbor workers if the conduct of the stevedores rendered the vessel unseaworthy. Section 5 of the Act, as amended, (33 USC §905(b)) provides:

> "In the event of injury to a person covered under this Act caused by the negligence of

> a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.
> * * * "

The legislative history makes it clear that Congress intended to overrule Ryan. The Report of the Senate Committee on Labor and Public Welfare accompanying the 1972 Amendments states (U. S. Senate, 92d Cong., 2d Sess., No. 92-1125, p. 11):

> "The Committee also believes that the doctrine of the Ryan case, which permits the vessel to recover the damages for which it is liable to an injured worker where it can show that the stevedore breaches an express or implied warranty of workmanlike performance is no longer appropriate if the vessel's liability is no longer

to be absolute, as it is essentially under the seaworthiness doctrine. * * * Furthermore, unless such hold-harmless, indemnity or contribution agreements are prohibited as a matter of public policy, vessels by their superior economic strength could circumvent and nullify the provisions of section 5 of the Act by requiring indemnification from a covered employer for employee injuries.

Accordingly, the bill expressly prohibits such recovery, whether based on an implied or express warranty. It is the Committee's intention to prohibit such recovery under any theory including, without limitation, theories based on contract or tort."

The legislative history further contemplated that a harbor worker could recover damages for the concurrent negligence of the vessel owner and the harbor worker's employer. Thus, the Report of the Senate Committee on Labor and Public Welfare states (op cit, p. 10):

> "Permitting actions against the vessel based on negligence will

meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to section 5 would still permit an action against the vessel for negligence. To recover he must establish: (1) the vessel put the foreign substance on the deck, or knew that it was there, and wilfully or negligently failed to remove it; or (2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in the exercise of reasonable care by the vessel under the circumstances. * * *" (Emphasis added).

Accordingly, Congress contemplated recovery against the vessel owner in cases of concurrent fault, the kind of fault

which is endemic to injuries aboard docked vessels, where there normally is commingling of employees of two or more employers, as Halcyon, Hawn and Ryan all bear witness.

The shipowning interests have simply refused to acquiesce in the will of Congress, urging the courts (vainly so far) to put them in a better position than the 1972 Amendments permit. Every collegiate court which has been called upon to decide the issue has rejected the Petitioner's contentions. Landon v. Leif Hoegh Co., Inc., 521 F2d 756 (CA2, June 18, 1975), certiorari denied sub nom. A/S ARCADIA v. Gulf Insurance Co., 44 US Law Week 3398 (January 12, 1976); Lucas v. "Brinknes" Schiffahrts Ges, 379 F Supp 759 (E.D., Pa. 1974) (before Lord, C.J., and Luongo

and Huyett, J.J.); Dodge v. Mitsui Shintaku Ginko, --- F2d ---(CA9, November 21, 1975); Shellman v. United States Lines, --- F2d --- (CA9, November 21, 1975).

Contrary to the suggestion of the Petitioner, there is no conflict between the above cases and Murray v. United States, 405 F2d 1361 (DC Cir., 1968). Murray arose before the 1972 Amendments to the Harbor Workers' Act and involved, not that Act, but the Federal Employees' Compensation Act, 5 USC §§8131, 8132. Murray stated, by way of dictum,2/that an employee injured through the concurrent negligence of the United States and a third party could recover only half of his damages from the third party, since he was drawing benefits

2/ Murray was cited with approval in Dawson v. Contractors Transport Corp., 467 F2d 727 (DC Cir., 1972), again by way of dictum.

from the United States under the Federal Employees' Compensation Act. Murray relied upon a rule peculiar to the District of Columbia, first announced in Martello v. Hawley, 112 US App DC 129, 300 F2d 721 (1962) that "* * * where one joint tortfeasor causing injury compromises the claim, the other tortfeasor, although unable to obtain contribution because the settling tortfeasor had 'bought his peace', is nonetheless protected by having his tort judgment reduced by one-half, on the theory that one-half of the claim was sold by the victim when he executed the settlement." (405 F2d at 1365). The Martello rule is peculiar to the District of Columbia, and the dictum of Murray shares the vice of most obiter: formulated without the benefit of argument, the decision

failed to consider that the United States has lien rights in any third party judgment obtained under the Federal Employees' Compensation Act. 5 USC §8132. In any event, Murray relied upon a substantive rule peculiar to the District of Columbia, involved the Federal Employees' Compensation Act rather than the Harbor Workers' Act, and predated the 1972 Amendments to the Harbor Workers' Act.

Neither is the decision below at odds with Griffith v. Wheeling Pittsburg Steel Corp., 521 F2d 37 (CA3, 1975), contrary to the suggestion of Pacific Merchant Shipping Association, which has asked this Court for leave to file an amicus brief in support of Mitsui's Petition. Griffith involved the question whether Section 5 of the Harbor Workers' Act, as amended,

preserves the rule of Reed v. SS YAKA, 373 US 410 (1963). Reed had held that a longshoreman was not precluded by the exclusive remedy provisions of the Act from bringing a third party action against a vessel which did its own stevedoring. Griffith determined, properly, that the intent of Congress in amending Section 5 was to preserve the rule of Reed v. YAKA to a limited extent. That question has nothing to do with the issue in this case.

Petitioner contends that this Court is free to "* * * fashion a fair remedy for a longshoreman injury caused by joint shipowner/stevedore negligence." (Petition, p. 2). The remedy proposed by the vessel owner would "impose unjustified burdens upon the injured longshoreman" as the court below pointed out (Petition, A-6). For

every case in which a negligent master stevedore recovers its compensation lien out of a third party recovery, there will be many other cases where the stevedore is compelled to pay compensation benefits for injury caused by a vessel which cannot be recovered in a third party action because of the extraordinary difficulty of proving a negligence action against an itinerant vessel manned by foreign crews.

The mandate of Congress embodied in the 1972 Amendments is not obscure. Shipowners do not like third party actions. Their views concerning the undesirability of such actions are frankly set out in the amicus motion and brief of Pacific Merchant Shipping Association, but are not the views of Congress as embodied in the 1972 Amendments to the Harbor Workers' Act, and have

necessarily been rejected by every appellate court which has considered them. The contentions raised by the Petition were before this Court in A/S ARCADIA v. Gulf Insurance Co., No. 75-646, cert. denied January 12, 1976, and there have been no fresh developments in the Circuit Courts of Appeal which would justify a grant of certiorari in this case to consider issues which the Court declined to review in The ARCADIA.

CONCLUSION

For the reasons above set forth, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RAYMOND J. CONBOY
910 Standard Plaza Bldg.
Portland, Oregon 97204
Attorney for Respondent
John Dodge

POZZI, WILSON & ATCHISON
Of Counsel

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,
Petitioner,

vs.

JOHN DODGE,
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and

BRADY-HAMILTON STEVEDORE CO.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF PACIFIC MERCHANT SHIPPING ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

and

BRIEF OF PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

GRAYDON S. STARING,
Two Embarcadero Center, 26th Floor,
San Francisco, California 94111,
Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

LILLICK MCHOSE & CHARLES,
Of Counsel.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Motion of Pacific Merchant Shipping Association for leave to file brief as amicus curiae in support of petition for a writ of certiorari	1
Brief of Pacific Merchant Shipping Association as amicus curiae in support of petition for a writ of certiorari	5
Interest of Pacific Merchant Shipping Association	5
Reasons for granting the writ	7
Conclusion	11

Table of Authorities Cited

Cases	Pages
Chouest v. A&P Boat Rentals, 472 F.2d 1026, 1973 A.M.C. 1542 (5th Cir. 1973)	10
Czaplicki v. Hoegh Silvercloud, 351 U.S. 525, 1956 A.M.C. 1465 (1956)	9
Dawson v. Contractors Transport Corp., 467 F.2d 727 (D.C. Cir. 1972)	8, 9
Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd., 394 U.S. 404, 1969 A.M.C. 745 (1969)	9
Fontana v. Pennsylvania R.R. Co., 106 F.Supp. 461, 1952 A.M.C. 1535 (S.D.N.Y. 1952), aff'd 205 F.2d 151, 1953 A.M.C. 1258 (2d Cir. 1953)	10
Griffith v. Wheeling-Pittsburgh Steel Corp., 521 F.2d 37 (3rd Cir. 1975)	8
Haynes v. Rederi A/S Aladdin, 362 F.2d 345, 1966 A.M.C. 2024 (5th Cir. 1966)	10
International Terminal Operating Co., Inc. v. Waterman Steamship Co., 272 F.2d 15, 1960 A.M.C. 306 (2d Cir. 1959)	10
Jarka Corp. of New England v. United States Lines Co., 387 F.2d 436, 1968 A.M.C. 487 (1st Cir. 1967)	10
Murray v. United States, 405 F.2d 1361 (D.C. Cir. 1968)	8, 9
Riddick v. Rederi A/B Fredrika, 271 F.Supp. 360, 1967 A.M.C. 1808 (E.D.Va. 1967)	10
Russo v. Flota Mercante Grancolombiana, 303 F.Supp. 1404, 1969 A.M.C. 2096 (S.D.N.Y. 1969)	10
Scozzari v. Jade Co., Inc., 350 F.Supp. 801, 1973 A.M.C. 1886 (E.D.N.Y. 1972)	10
The Etna, 138 F.2d 37, 1943 A.M.C. 1126 (3rd Cir. 1943)	10
United States v. Reliable Transfer Co., ... U.S. ....., 1975 A.M.C. 541 (1975)	8

Statutes	
Federal Employees' Compensation Act	9
1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act	3, 6, 7, 9
33 U.S.C. §905(b)	7, 8

In the Supreme Court
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF PACIFIC MERCHANT SHIPPING ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pacific Merchant Shipping Association respectfully moves this Court for leave to file the accompanying Brief as *amicus curiae* in support of the petition for certiorari

in this case. The consent of the attorney for the petitioner herein has been obtained, but the attorney for respondent Dodge herein has refused to consent to the filing of such a brief.

The applicant has a strong interest in the disposition of this case. Pacific Merchant Shipping Association is a voluntary association of American steamship companies[1] conducting major operations and, in most instances, having their headquarters on the West Coast and within the Ninth Circuit. They are exposed to injury claims of longshoremen and engaged in frequent litigation of such claims in the federal district courts of the Ninth and other maritime circuits and may be considered representative of numerous other American steamship companies also involved in such litigation.

In addition to having a large number of longshoremen's lawsuits pending against its members, Pacific Merchant Shipping Association is, by stipulation, filing a brief *amicus curiae* in support of the petition for a writ of certiorari in the case of *United States Lines, Inc. v. Shellman,* No. ....., October Term, 1975, and had filed a brief as *amicus curiae* in that case in the United States Court of Appeals for the Ninth Circuit, where it was a companion case argued together with this one. Should this Court grant the petition for a writ of certiorari in the *Shellman* case, Pacific Merchant Shipping Association will seek to file a further brief as *amicus curiae* upon the

[1]Alaska Hydro-Train (a division of Crowley Maritime Corporation), American President Lines (including American Mail Line), Matson Navigation Company, Pacific Far East Lines, Inc., Prudential-Grace Lines, Inc., States Steamship Company, and United States Lines, Inc.

merits. The issues in the *Shellman* case and the case herein are substantially identical. The two cases raise important questions concerning the meaning of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Those Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoremen and vessel or between vessel and stevedore, and, consistently with that aim, provided dramatic but much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. As in the past, members of the Association now pay the resulting higher premiums for such insurance, so far as the premiums are attributable to the stevedoring of their own vessels, as a distinct element of the rates which they pay to their stevedore contractors.

The Association and its members are keenly interested in interpretations of the Act which will result in achieving the broad purposes of the 1972 Amendments by providing longshoremen with the ample benefits and long-term security which the Act provides, unburdened by a heavy overlay of attorneys' fees; by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating numerous costly and confusing problems in the past administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably determined in accordance with the overall aims of the Amendments and current views on the distribution of loss.

While the petitioner in this case has interests in common with the members of this Association, it is but a single steamship company and can speak only for itself from its own experience and point of view. This Association, on the other hand, while by no means comprising all American steamship companies, comprises a major and representative group of them and is therefore able to speak, as it desires to do, from their experience and viewpoint as to the magnitude of the questions raised by the petition, in respect of the large number of cases directly affected, the possible effect of their disposition upon still other cases, the potential for protracted uncertainty and the consequent burden upon not only the parties but the lower courts, and the interest of the industry at large in having the questions involved disposed of on a sound doctrinal basis calculated to reduce future litigation.

Dated, January 30, 1976.

GRAYDON S. STARING,
Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

LILLICK MCHOSE & CHARLES,
Of Counsel.

In the Supreme Court
OF THE
United States

October Term, 1975

No. 75-1058

Mitsui Shintaku Ginko K.K., Tokyo,
Petitioner,

vs.

John Dodge,
Respondent,

and

Brady-Hamilton Stevedore Co.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF PACIFIC MERCHANT SHIPPING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF PACIFIC MERCHANT SHIPPING ASSOCIATION

Amicus curiae, Pacific Merchant Shipping Association, is a voluntary association of American steamship com-

panies[1] conducting major operations and, in most instances, having their headquarters on the West Coast and within the Ninth Circuit. They are exposed to injury claims of longshoremen and engaged in frequent litigation of such claims in the federal district courts of the Ninth Circuit and other maritime circuits and may be considered representative of numerous other American steamship companies also involved in such litigation.

United States Lines, Inc. v. Shellman, No. ....., October Term, 1975, and *Mitsui Shintaku Ginko K.K., Tokyo v. Dodge and Brady-Hamilton Stevedore Co.,* No. 75-1058, October Term, 1975, raise important questions concerning the meaning of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act. Those Amendments made a number of changes in the Act intended to shift the emphasis sharply back toward the compensation security features of the Act and away from lawsuits, whether between longshoremen and vessel or between vessel and stevedore, and, consistently with that aim, provided dramatic but much needed increases in the compensation benefits payable under the Act. Those benefits are normally insured. As in the past, members of the Association now pay the resulting higher premiums for such insurance, so far as the premiums are attributable to the stevedoring of their own vessels, as a distinct element of the rates which they pay to their stevedore contractors.

[1]Alaska Hydro-Train (a division of Crowley Maritime Corporation), American President Lines (including American Mail Line), Matson Navigation Company, Pacific Far East Lines, Inc., Prudential-Grace Lines, Inc., States Steamship Company, and United States Lines, Inc.

The Association and its members are keenly interested in interpretations of the Act which will result in achieving the broad purposes of the 1972 Amendments by providing longshoremen with the ample benefits and long-term security which the Act provides, unburdened by a heavy overlay of attorneys' fees; by shifting the emphasis back where it belongs to the compensation features of the Act; by eliminating numerous costly and confusing problems in the past administration of the Act; and by ensuring that litigation, when it does ensue, will be equitably determined in accordance with the overall aims of the Amendments and current views on the distribution of loss.

REASONS FOR GRANTING THE WRIT

We concur with the petitioner that the case presents an important question of federal law which has not been but should be settled by this Court for the reasons stated in the petition, the reiteration of which we would spare the Court here. We would add, however, some figures suggesting the number of cases affected by the disposition of the question. The seven members of this Association had pending against them, as of December 31, 1975, a total of 216 lawsuits for injuries to longshoremen and harbor workers occurring since November 26, 1972, and therefore subject to 33 U.S.C. §905(b), the new subsection effective as of that date which the Court is asked by the petitioner to construe in this case. Most such cases involve the issue of stevedore negligence and the questions raised by petitioner here. It may be assumed that the many other steamship companies operating in United States ports have

similar numbers of such claims pending against them. In all such cases, whatever the Court of Appeals may have said below, it is necessary to litigate such questions until they are finally settled by this Court. The volume of the litigation and the number of parties and suits involved in uncertainty pending final decision by this Court go far, we submit, to establish the importance of the question.

We also concur with petitioner that the decision below is in conflict with the decisions of other Courts of Appeals, in particular the decisions in *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972), *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968) and *Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 37 (3rd Cir. 1975). We also concur that the decision is contrary to the implications of this Court's decision in *United States v. Reliable Transfer Co.*, ... U.S. ....., 1975 A.M.C. 541 (1975).

Unfortunately, the Court of Appeals for the Ninth Circuit, while deciding what should be the outcome of this case, contributed almost nothing to the settlement of the question involved for the nation as a whole, despite excellent briefing of all points of view and a combined oral argument of the *Shellman* and *Dodge* cases in which nine counsel were heard and the questions presented by the petition here were strongly urged and ably discussed. The Court of Appeals opinion failed to acknowledge the central question presented by the petition here, which has to do with the interpretation of §905(b): gave that section, upon which the whole case turns, no explicit analysis whatever; and decided the case by an opinion which would

seem to deal with the case as one arising prior to the enactment of the section.

Because of the importance of the questions presented here in so many cases below and to so many parties, they should be settled definitively and early. But more than that, they should, in our view, be settled on a basis broader than the disposition of a single case or group of cases. The Longshoremen's and Harbor Workers' Compensation Act has given rise to a great many nagging problems in the courts in its fifty-year history, of which the distribution of risks between vessel owner and stevedore employer is only one. The 1972 Amendments to the Act have explicitly dealt with some of these problems. notably by dramatically increasing compensation benefits, by adjusting geographical scope of coverage and by eliminating the warranty of seaworthiness and the recovery of indemnity against an employer.

Other problems not explicitly solved, however, involve whether employer, employee or both may sue the vessel owner as third party in certain circumstances;[2] differences in treatment of longshoremen from the treatment of the majority of the employees covered by the Act,[3] as well as employees covered by the companion Federal Employees' Compensation Act;[4] vagueness about the employer's recoupment of compensation benefits out of the third party damages when suit is brought by the employee

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[2]See *Czaplicki v. Hoegh Silvercloud*, 351 U.S. 525, 1956 A.M.C. 1465 (1956); *Federal Marine Terminals, Inc. v. Burnside Shipping Co., Ltd.*, 394 U.S. 404, 1969 A.M.C. 745 (1969).

[3]Compare *Dawson v. Contractors Transport Corp.*, 467 F.2d 727 (D.C. Cir. 1972).

[4]Compare *Murray v. United States*, 405 F.2d 1361 (D.C. Cir. 1968).

rather than the employer;[5] uncertainty as to whether the vessel owner has an obligation to protect the employer's interest in such recovery;[6] and disparate treatment of the deduction of attorneys' fees in the allocation of recovery where the employee rather than the employer sues the third party.[7] We believe that all of these questions are related in principle and that the questions raised here should be not only settled early but settled in a manner which does not aggravate other problems but advances their solution by resting decision upon a sound principle with all such problems in mind.

We have advocated such a position in the Court of Appeals. We agree in the main with the position of the petitioner, although not necessarily in all details, and are interested in seeing that the Court is presented with a broader view of the field of litigation relative to the Act involved and with views other than our own and other than those of the District Court in *Shellman,* in the hope that this Court will not only decide this case but do so upon a sound and equitable basis which will dispose of

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[5]See *The Etna,* 138 F.2d 37, 1943 A.M.C. 1126 (3rd Cir. 1943); *Fontana v. Pennsylvania R.R. Co.,* 106 F.Supp. 461, 1952 A.M.C. 1535 (S.D.N.Y. 1952), aff'd, 205 F.2d 151, 1953 A.M.C. 1258 (2d Cir. 1953) and cases there cited.

[6]Compare *International Terminal Operating Co., Inc. v. Waterman Steamship Co.,* 272 F.2d 15, 1960 A.M.C. 306 (2d Cir. 1959) with *Jarka Corp. of New England v. United States Lines Co.,* 387 F.2d 436, 1968 A.M.C. 487 (1st Cir. 1967).

[7]Compare *Chouest v. A&P. Boat Rentals,* 472 F.2d 1026, 1973 A.M.C. 1542 (5th Cir. 1973) and *Scozzari v. Jade Co., Inc.,* 350 F.Supp. 801, 1973 A.M.C. 1886 (E.D.N.Y. 1972) with *Haynes v. Rederi A/S Aladdin,* 362 F.2d 345, 1966 A.M.C. 2024 (5th Cir. 1966); *Russo v. Flota Mercante Grancolombiana,* 303 F.Supp. 1404, 1969 A.M.C. 2096 (S.D.N.Y. 1969) and *Riddick v. Rederi A/B Fredrika,* 271 F.Supp. 360, 1967 A.M.C. 1808 (E.D.Va. 1967).

other related but dissimilar cases hereafter. To this end, if certiorari is granted, we will seek to file a brief *amicus curiae* upon the merits.

CONCLUSION

For the foregoing reasons, we pray that the petition for a writ of certiorari be granted.

Dated, January 30, 1976.

Respectfully submitted,

GRAYDON S. STARING,

Attorney for Pacific Merchant Shipping Association as Amicus Curiae.

LILLICK MCHOSE & CHARLES,

Of Counsel.

IN THE

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MITSUI SHINTAKU GINKO K.K., TOKYO,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMERICAN INSTITUTE OF MERCHANT SHIPPING FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOUIS J. GUSMANO
120 Broadway, Room 3161
New York, New York 10005

Attorney for American Institute of Merchant Shipping as Amicus Curiae.

KIRLIN, CAMPBELL & KEATING
JOHN R. GERAGHTY
Of Counsel

INDEX

PAGE

Motion of American Institute of Merchant Shipping for leave to file brief as *amicus curiae* in support of petition for a writ of certiorari 1

Brief of American Institute of Merchant Shipping as *amicus curiae* in support of petition for a writ of certiorari 5

Interest of American Institute of Merchant Shipping .. 5

Reasons for granting the writ 7

Conclusion 9

Table of Authorities

Statutes:

Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 905, as amended Oct. 27, 1972, Publ. L. 92-576, § 18 (a) 86 Stat. 1263) 6

Cases:

A/S Arcadia v. *Gulf Insurance Company*, Supreme Court No. 75-646, October Term, 1975, decided *sub nom. Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756 (2d Cir. 1975) 7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,

Petitioner,

vs.

JOHN DODGE,

Respondent,

and

BRADY-HAMILTON STEVEDORE CO.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMERICAN INSTITUTE OF MERCHANT SHIPPING FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This motion is respectfully submitted on behalf of The American Institute of Merchant Shipping (referred to as AIMS) for leave to file the within brief *amicus curiae* in support of the petition for certiorari in the above matter. The petitioner has consented to the filing of an *amicus curiae* brief by AIMS in support of the petition for certiorari, but the respondent John Dodge has refused his consent.

The issues involved in this case are similar to the issues involved in *United States Lines, Inc.* v. *John Shellman,* in

which a petition for certiorari was docketed in this Court on February 9, 1976, No. 75-1058, October Term, 1975. AIMS is filing a brief *amicus curiae* in support of the petition for certiorari in the *Shellman* case upon the consent of all parties. The brief of AIMS in the *Shellman* case is substantially identical to the brief accompanying this motion.

AIMS was formed in January, 1969, by merger of three shipping associations: the American Merchant Marine Institute, the Committee of American Steamship Lines and the Pacific American Steamship Association.

AIMS represents the nation's largest association of American-flag shipowners, and is composed of over 30 companies operating over 400 ships in the foreign, coastal and intercoastal trades. These vessels represent about two-thirds of all active privately owned ships registered under the United States flag and aggregate over 8 million deadweight tons. The members of AIMS include Alaska Hydro-Train, Amerada Hess Corporation, American Export Lines, Inc., American President Lines, Ltd., Amoco Shipping Company, Atlantic Richfield Company, Chevron Shipping Company, Delta Steamship Lines, Inc., Dover Shipping Company, El Paso LNG Company, Exxon Company, U.S.A., Farrell Lines Incorporated, Gulf Oil Trading Company, International Ocean Transportation Corporation, Interstate Oil Transport Company, Keystone Shipping Co., Lykes Bros. Steamship Company, Inc., Marine Transport Lines, Inc., Mobil Oil Corporation, Moore McCormack Lines, Inc., National Bulk Carriers, Inc., Phillips Petroleum Company, Prudential Lines Inc., States Steamship Company, Sun Transport, Inc., Texaco, Inc., Trinidad Corporation, Union Oil Co. of California and United States Lines, Inc.

As revealed by the accompanying brief, this matter involves important interpretations of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. §§ 901 et seq.). The questions involved affect the legal relationships among harbor workers, their employers and shipowners throughout the United States. We submit that the entire United States maritime industry has a substantial interest in obtaining a definitive ruling by this Court on the issues presented in this case and in the *Shellman* case.

The members of AIMS, our nation's largest association of American-flag shipowners, therefore, have a substantial interest in the outcome of this petition for certiorari. If certiorari is granted in this case and in the *Shellman* case, AIMS will seek permission to file briefs *amicus curiae* on the merits, in order to provide the Court with the benefits of the views of the United States shipping industry concerning these important questions of maritime law.

Accordingly, it is respectfully requested that this court allow AIMS to file the accompanying brief *amicus curiae*, in which it more specifically delineates the compelling need of the shipping industry for a final determination by this Court of the crucial issues involved.

Dated: New York, New York
February 17, 1976

LOUIS J. GUSMANO
Attorney for American Institute of Merchant Shipping as Amicus Curiae

KIRLIN, CAMPBELL & KEATING
JOHN R. GERAGHTY
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1058

MITSUI SHINTAKU GINKO K.K., TOKYO,

Petitioner,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN INSTITUTE OF MERCHANT SHIPPING AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Interest of American Institute of American Shipping

Amicus Curiae, American Institute of Merchant Shipping, referred to as AIMS, is a voluntary association which was formed in 1969 by merger of three shipping associations—the American Merchant Marine Institute, the Committee of American Steamship Lines and the Pacific

American Steamship Association. It represents the nation's largest association of American flag shipowners.

AIMS and its members, composed of over 30 companies operating over 400 ships registered under the U. S. flag, respectfully submit that the issues involved in *Mitsui Shintaku Ginko K.K., Tokyo* v. *John Dodge and Brady-Hamilton Stevedore Co.*, No. 75-1058, October Term, 1975 and its companion case, *United States Lines, Inc.* v. *John Shellman*, No. 75-1121, October Term, 1975 decided by the Ninth Circuit at the same time on November 21, 1975, are of real and vital concern to the shipping industry.

These cases involve a recurrent controversy which AIMS and its members have a strong interest in resolving. The members of AIMS are confronted with claims and suits involving the issues presented by *Dodge* and *Shellman*. These issues concern the effect of substantial negligence by a harbor worker's employer under the *Longshoremen's and Harbor Workers' Compensation Act* (33 U.S.C. § 905, as amended Oct. 27, 1972, Pub. L. 92-576, § 18 (a), 86 Stat. 1263) on (a) the harbor worker's recovery of damages against the shipowner; and (b) the negligent employer's recovery of compensation benefits paid to the harbor worker.

These issues necessarily involve construction of the 1972 amendments to the Longshoremen's Act. They have remained unresolved by this Court, although they surely will frequently recur in cases both in the Federal and State courts.

The Ninth Circuit below recognized the similarity of the issues presented in these cases, when it consolidated the cases for oral argument and decided them together. Accordingly, the brief by AIMS as *amicus curiae* in *Dodge* will not differ materially from the one filed in *Shellman*.

Filing of this brief *amicus curiae* was consented to by all parties in *Shellman* but in *Dodge* plaintiff-respondent refused to consent. This explains why the motion seeking leave to file the brief has been made in *Dodge* but not in *Shellman*.[1]

Reasons for Granting the Writ

AIMS concurs in the reasons given by petitioners in *Dodge* and *Shellman*, and by Pacific Merchant Shipping Association as *amicus curiae*, for the granting of the writ of certiorari. AIMS supplements these reasons below, and also advances additional reasons why certiorari should be granted.

The Ninth Circuit when it granted a preference to the hearings in *Dodge* and *Shellman* realized that they presented important issues which will recur. This was again impliedly affirmed in the *Shellman* decision where the Ninth Circuit allowed a voluntary dismissal of the employer's appeal although it presumed the case involved "a recurrent controversy which the public has a strong interest in resolving". (*Shellman* petitioner's appendix, p. A16). Denial of certiorari, which is not on the merits will not put these recurring issues to rest but will invite further litigation and appeals leading to petitions for a writ of certiorari in order to obtain a resolution on the merits. This is clearly indicated by the fact that petitions in several cases (not only the instant cases of *Dodge and Shellman*, but also in *A/S Arcadia*, discussed below), involving writs seeking certiorari based on these issues, have been filed in this October, 1975 Term.

On January 12, 1976 this Court denied certiorari in *A/S Arcadia* v. *Gulf Insurance Company*, No. 75-646 Octo-

[1] The stipulation consenting to the filing of the *amicus curiae* brief in Shellman is annexed as appendix A.

ber Term, 1975, decided by the Second Circuit *sub nom. Landon* v. *Lief Hoegh and Co., Inc.*, 521 F. 2d 756. *A/S Arcadia*, however, involved an interlocutory appeal, as the opinion of the Second Circuit states at 521 F. 2d at p. 763: "Appellant's second argument that the plaintiff may not recover against the shipowner unless he proves that the ship's negligence was *solely* responsible for his injury is strictly not before us on this interlocutory appeal." The only question directly presented to the Second Circuit was whether the stevedore or its insurer was an indispensable or necessary party pursuant to Rule 19 F.R.C.P. in the suit brought by the injured longshoreman against the shipowner (521 F. 2d at p. 761). The Second Circuit held that the litigation between the injured longshoreman and the shipowner could properly proceed in "the employer's absence" and that "complete relief can be accorded among those already parties" (521 F. 2d at p. 761); accordingly it held that the employer or its insurer was not an indispensable or necessary party. Obviously in *A/S Arcadia* there was no finding or even proof of negligence by the stevedore to any degree. Here, however, final judgments are involved, the negligence of the employers has been adjudicated and found to be a substantial factor in causing the injuries to the longshoremen. In *Dodge* and *Shellman*, the issues are squarely presented, therefore, as to whether the decisions of the Ninth Circuit have resulted in an inequitable apportionment of responsibility among the parties based on this adjudicated negligence.

The question raised by the Ninth Circuit as to the inequity in allowing a substantially negligent employer full recovery of its compensation payments also make the *Dodge* and *Shellman* cases particularly appropriate for review by this Court. This inequity was acknowledged in *Dodge* where the Ninth Circuit said at footnote 1:

> "It is indeed questionable whether it is equitable for the stevedore employer to recover the full amount of its compensation payments even if its negligence were a concurring cause of the longshoreman's injuries". (*Dodge* petitioner's appendix, p. A 10).

Despite this inequity the Ninth Circuit believed it was obligated to follow language used by this Court in older cases which did not involve the 1972 amendments to the Longshoremen's Act, and which were decided before the right of full indemnity by the shipowner against the employer was abolished by the amendments. This Court should be the forum to make this pronouncement, and by granting certiorari it will be enabled to state authoritatively whether it intends the rationale of the prior decisions to remain the law under the new amendments even though the result proves inequitable.

CONCLUSION

It is respectfully submitted that the Court should grant the petition for a writ of certiorari.

Dated: New York, New York
February 17, 1976

Respectfully submitted,

Louis J. Gusmano
120 Broadway, Room 3161
New York, New York 10005
Attorney for American Institute of Merchant Shipping as Amicus Curiae.

Kirlin, Campbell & Keating
John R. Geraghty
Of Counsel

LILLICK McHOSE & CHARLES
MICHAEL D. DEMPSEY
611 West Sixth Street, 28th Floor
Los Angeles, California 90017

213-620-9000

Attorneys for Defendant-Petitioner
United States Lines, Inc.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

JOHN SHELLMAN,

Plaintiff-Respondent

vs

UNITED STATES LINES, INC.

Defendant-Petitioner

HARTFORD ACCIDENT & INDEMNITY COMPANY,

Plaintiff in Intervention

vs

UNITED STATES LINES, INC. and JOHN SHELLMAN,

Defendants in Intervention

STIPULATION FOR FILING OF AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The parties stipulate that the American Institute of Merchant Shipping may file an amicus curiae brief in support of the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit in JOHN SHELLMAN v. UNITED STATES

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Appendix A

LINES, INC., No. 75-3071 vs. HARTFORD ACCIDENT & INDEMNITY COMPANY
vs. UNITED STATES LINES, INC. and [illegible], No. 75-3058.

Clayton R. Green
Attorney for Plaintiff

LILLICK McHOSE & CHARLES

By
Michael D. Dempsey
Attorneys for Defendant

Robert Sikes
Attorney for Intervenor

Dated: January 23, 1976